IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

FIRST APPEAL NO.1960 OF 2007

Shri R. Samuel Appellant
(Orig.Plaintiff)

vs

New Swapnapurti Co.op.Hsg.Soc.Ltd.
& ors. Respondents
(orig.Defendants)

Mr.Snehal Shah with Mr.N.S.Shaikh i/b.Mr.S.K.Srivastav
for the appellant.

Mr.S.S.Joshi for the respondents.

CORAM : ANOOP V. MOHTA,J.

DATED : 7th August, 2007

P.C.

The appellant-plaintiff has challenged the impugned order of dismissal of the Suit under Order VII Rule 11 (d) of the Code of Civil Procedure,1908 (CPC).

2. The appellant, who is builder by occupation, has filed the present Suit based on the following averments:

"3. The plaintiff submit that all the flats have been constructed as per the provisions of the Maharashtra Ownership Flats Act. Further as regards "C" Wing, the plaintiff has formed the Co-operative Housing Society, bearing Registration No.MUM/W.P./HSG/(TC)/13578/Year 2006-2007, w.e.f. October, 2006 i.e. Defendant No.1 and thereafter the affairs of the Building have been managed by the Defendants and other flat owners.

7. The plaintiff further submits that fearing that the office bearers of the defendants will act in a high handed manner, and that there would be a breach of peace, the plaintiff addressed a letter to the Senior Inspector of Police, dated 16th January, 2007. Hereto annexed and marked as Exhibit "D" is the copy of letter dated 16th January, 2007 addressed to the Senior Inspector of Police, Dindoshi. The plaintiff further submit that even the police Station is not attending to the grievances of the plaintiff since two police constable attached to Dindoshi Police Station are residing in the said building namely Mr.Astekar and Mr.D.D.Sawant i.e. Defendant Nos. 6 and 5. Hence the plaintiff is apprehending damage to the society property.

8. The plaintiff submits that he has lodged two N.C.complaint with the Dindoshi Police Station bearing No.177 dated 13.01.2007 and bearing No.214/07 dated 17.01.2007 is hereto annexed and marked as Exhibit E (Colly) is the copies of N.C.Complaints. Since certain flat owners were trying to break open the lock put to the main gate and the other places in the Complex."

The appellant has also taken out Notice of Motion No.344/2007 for injunction.

3. The respondents/defendants in Notice of Motion No.384/2007 by invoking Order VII, Rule 11(d) of the CPC submitted to reject the plaint for want of statutory notice under Section 164 of Maharashtra Cooperative Societies Act, 1960 (MCS Act).

4. Admittedly there was no such notice issued. The averments made, as reproduced above, reflect that the appellant's suit and claim is against the society and its office bearers. There is nothing on record to suggest that such statutory notice was waived or dispensed with.

5. The learned Judge has dismissed the Suit by the impugned order dated 16.3.2007 for want of statutory notice and on merits observed that the appellant failed to make-out a case for grant of interim relief.

6. Having once came to the conclusion to reject the plaint, there should not have been any observation on merit.

7. The Court has power under VII, Rule 11 of CPC to reject the plaint on this ground of non-compliance of statutory notice under Section 164 of MCS Act. In **Saleem Bhai & ors. v. State of Maharashtra & ors., AIR**

2003 SC 759, based on this provision, the Supreme Court has upheld the power of the Court to reject the plaint on the basis of averments made. See also Begum Sahiba Sultan x Nawab Mohd.Mansur Ali Khan, 2007 (4) SCC 343.

8. This Court in **District Central Co-operative Bank Ltd. vs. Heminath Balbhim Shinde, 2003 (5) Bom.C.R. 841,** while considering Section 164 of MCS Act held that the Suit is not maintainable, if no notice is served. In the present case, in view of the averments as reproduced above and as the basic prayers are against the society and its office bearers and in view of the finding recorded in this regard in para 7 (page 14), I am of the view that the learned Judge has rightly observed that the Suit is not maintainable. However, the order of dismissal of the Suit need to be considered as rejection of plaint as contemplated under Order VII, Rule 11 of CPC.

9. The appellant-plaintiff is at liberty to take appropriate steps in view of the above order, including to file fresh application/notice of motion for injunction or such ad-interim order.

10. The first appeal is therefore disposed of accordingly in the above terms. No costs.

[ANOOP V. MOHTA,J.]